

COBRA NOTICE LITIGATION

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Background: COBRA Notice Requirements

- ERISA Section 606 specifies COBRA notice requirements
 - Different requirements for single-employer and multiemployer plans
- Five areas of possible litigation in connection with COBRA notices:
 - Who is entitled to receive COBRA notices?
 - When are COBRA notices provided?
 - Who must provide COBRA notices?
 - What information must be included in COBRA notices?
 - How can the COBRA notices be provided?

COBRA Notice Requirements

- Notice provided to participant and spouse
 - Unclear if domestic partner/civil union person is entitled to COBRA notice
 - If dependent is at same address as participant or spouse, dependent need not receive separate notice
- Notice of COBRA rights must be provided within 90 days of the beginning of coverage under the group health plan and in connection with 6 qualifying events

COBRA Notice Requirements, cont'd.

- General notice of COBRA continuation coverage can be provided in the plan's summary plan description
- The qualifying event most involved in the recent COBRA notice litigation is separation from service
- ERISA Section 606(a)(4) provides that the administrator shall provide the notices
- ERISA Section 606(c) titled "Rules Relating to Notification of Qualified Beneficiaries by Plan Administrator"

COBRA Notice Requirements, cont'd.

- “Plan administrator” is defined term under Internal Revenue Code Section 414(g), but not a defined term under ERISA
 - However, DOL regulation section 2510.3-16 is titled “definition of plan administrator”
 - Regulation indicates that “administrator” and “plan administrator” are equivalent terms

COBRA Notice Requirements, cont'd.

- “Administrator” is defined under ERISA Section 3(14)
 - Person designated under the terms of the plan
 - If administrator is not so designated, the plan sponsor
 - If the administrator is not identified in the plan document and the plan sponsor cannot be identified, DOL has regulatory authorization to identify the plan administrator, but has not implemented such regulations

Identification of Plan Administrator in COBRA Notice

- Courts and DOL disagree as to whether plan administrator required to be identified in election notice, if notice provides the name and contact information of person actually responsible for administering the plan
 - *Bryant v. Wal-Mart Stores, Inc.*, 2019 WL 3542827 (S.D. Fla. Apr. 18, 2019), and *Riddle v. Pepsi Co., Inc.*, 440 F. Supp. 3d 358 (S.D.N.Y. 2020), hold that COBRA notice must include plan administrator's information
- DOL in amicus brief takes opposite position: Administrator is party responsible for providing COBRA notices

Identification of Plan Administrator in COBRA Notice, cont'd.

- Neither COBRA nor DOL COBRA regulations require that any specific entity administer COBRA benefits
 - Third-party administrators (TPAs) play a significant role for both large and small employers
 - Defendant's argument: notice that provides the name and contact information of an expert TPA, when that is exactly the best part for employees to call for information about COBRA or an employee's status, creates no harm

Delivery and Timing of Notice

- Can be delivered in person, by mail, or electronically
 - Recently updated DOL regulations with respect to electronic delivery do not apply to COBRA notices
 - Administrator generally notifies qualified beneficiary within 14 days of notice of a qualifying event
 - Notice period extended to 44 days if employer is plan administrator and employer is required to provide notice to administrator

Content of Notice

- “Written in a manner calculated to be understood by the average plan participant”
 - Same standard as for summary plan descriptions
 - Objective standard, rather than requiring inquiry into subjective perception of individual plan participant
- DOL has issued model COBRA notices for single-employer plans
 - Can be modified for multiemployer plans and plans maintained by employee organizations for their members

Content of Notice, cont'd.

- Notice for initial coverage and a COBRA election notice
- Notice updated in May to better explain relationship between Medicare and COBRA
- Use of model notice, appropriately modified and supplemented, is deemed to satisfy notice content requirement
- Use of DOL model notice not mandatory

Content of Notice, cont'd.

- Not a generic notice
 - Relevant language must be added where indicated in model notice
 - Selection among alternative language
 - Notice can be supplemented to add relevant plan provisions: Information not applicable to a particular plan may be deleted

Content of Notice, cont'd.

- Employers frequently modify language of model notice if notice may be confusing and too long for their workforces
 - Modified model notice intended to contain substantially the same information as the DOL model notice

Background: COBRA Notice Litigation

- No indication that modifications to DOL model COBRA notice were intended to make it more difficult to understand COBRA notice or to discourage qualified beneficiaries from electing COBRA
- May have been lax in reviewing the precise language of the notice
- Plaintiffs' bar, rather than injured plan participants, is behind these lawsuits
- This type of lawsuit is the type of litigation that the Supreme Court sought to foreclose in *Thole v. US Bancorp* last term

COBRA Notice Litigation

- This appears to be benign, and not the stuff of class action litigation
 - However, in recent years there has been a significant uptick in COBRA notice litigation
 - Florida and New York have greatest number of cases
 - Most recent Florida cases brought by the same law firms
- Class action suits have alleged that deviations from model notices render notices deficient
- No precedent that employer notice must be identical to DOL notice to be sufficient
 - Difficult to have case dismissed at pleading stage

COBRA Notice Litigation, cont'd.

- Plaintiffs allege notice deficiencies, including:
 - Failure to include name of plan under which continuation is available
 - Failure to provide the name, address, and telephone number of plan administrator or the entity responsible for providing the notice
 - Failure to identify the qualifying event
 - Failure to identify the qualified beneficiary by status or name
 - Failure to identify the date on which coverage will end if COBRA is not elected

COBRA Notice Litigation, cont'd.

- Plaintiffs allege notice deficiencies, including (cont'd.):
 - Failure to identify the date on which coverage will end if COBRA coverage is elected
 - Failure to adequately explain the procedures for electing coverage under COBRA
 - Erroneously directs participants to a general phone number rather than providing explicit instructions on how to enroll
 - Failure to contain the address to which COBRA payments are to be sent
 - Failure to include an explanation of the consequences of failing to elect or waive COBRA

COBRA Notice Litigation, cont'd.

- Plaintiffs allege notice deficiencies, including (cont'd.):
 - Failure to include a description of the amount that will be required to pay for COBRA continuation coverage
 - Providing notice in multiple letters rather than single notice
 - Failure to provide a physical election form

Relief That Plaintiffs Are Seeking

- Equitable relief-enjoining administrators from continuing to issue deficient notices
 - Ordering administrators to issue correct COBRA notices
- Coverage of unpaid medical expenses
- Harm caused by failure to obtain medical treatment
 - Possibly no claim if no harm resulted from failure to obtain medical treatment

Relief That Plaintiffs Are Seeking, cont'd.

- COBRA continuation coverage
- Attorneys fees
- ERISA Section 502(c)(1) imposes a potential penalty of \$110 per participant per day for failure to provide an accurate and complete notice
 - Purpose of Section 502(c)(1) to incentivize compliance, not to punish wrongdoers or to compensate participants
 - Whether to impose statutory damages and amount of statutory damages if awarded are discretionary with district court

Relief That Plaintiffs Are Seeking, cont'd.

- Various issues under ERISA Section 502(c)(1)
 - Date on which penalty begins to run
 - Date on which penalty ends
 - Amount of penalty
 - Split of authority as to whether dollar penalty applies solely to plan participant or also to spouse and dependents of plan participant
 - Good faith and absence of prejudice are mitigating factors
 - Absence of bad faith and prejudice does not preclude an award

Threshold Defense to Claims - Standing

- To commence an action in federal district court, a party must have both (a) what was previously referred to as statutory standing and (b) Article III standing, the threshold inquiry
- Article III standing is otherwise known as the case or controversy requirement
- Statutory violation by itself does not establish Article III standing
- It is plaintiffs' burden – at least one named class representative must have Article III standing

Constitutional Standing

- Three elements of Article III standing
 - An injury in fact
 - Fairly traceable to alleged conduct of defendant
 - Likely to be addressed by a favorable judicial decision
- To establish injury in fact, plaintiff must show
 - Invasion of a legally protected right
 - Concrete and particularized
 - Actual or imminent
 - Not conjectural or hypothetical
 - Must be real, but need not be tangible

Constitutional Standing – Injury in Fact

- Informational injury, in other contexts such as housing, can provide basis for Article III standing
- For statutory violation, plaintiff must show precise harm or increased risk of harm that statute is designed to prevent
- Allegation that by being denied access to information, plaintiffs suffered the type of harm Congress sought to prevent by disclosure
- Technical procedural violations that do not cause actual harm are insufficient to establish constitutional standing

Constitutional Standing – Causation

- Second prong—causal connection
 - Injury must be fairly traceable to challenged action of defendant
 - Must not be the result of independent action of third party not before the court
- Whether notice was deficient in such a way as to impact plaintiff's ability to obtain medical insurance may not be appropriate for resolution on motion to dismiss

Class Certification Under FRCP

- If class is not certified, unlikely that individual plaintiff will pursue litigation
- Class must be adequately defined and clearly ascertainable
- Identifiable class exists if its members can be ascertained by reference to objective criteria
 - Objective criteria should be administratively feasible
 - Administrative feasibility—identifying class members is a manageable process that does not require much, if any, individual inquiry

Class Certification – Rule 23 Requirements

- Named plaintiffs must have standing
- Putative class must meet each of the four requirements in FRCP 23(a) and one requirement of FRCP 23(b)
 - Numerosity
 - Commonality
 - Typicality
 - Adequacy of representation
- *See Vazquez v. Marriott* (M.D. Fla. 2017) and *Bryan v. Wal-Mart* (M.D. Fla. 2020)

Defenses Upon Merits

- Compliance with legal requirements
 - Demonstrating that the challenged notice complies in substance with the regulatory requirements:
 - Adequately identifying the plan administrator
 - Written in a manner calculated to be understood by the average plan participant
 - Includes correct contact information, address and phone number
 - Often conflicting interpretations of the regulation
- Substantial compliance
 - Substantial compliance with the essential requirements satisfies the purpose or objective of the regs even though all of the formal requirements are not satisfied
 - Substantial compliance is not raised in all instances on motion to dismiss

Defenses Upon Merits, cont'd.

- COBRA does not specify what constitutes adequate notice to plan participants
 - COBRA notice must provide sufficient information to allow a qualified beneficiary to make informed decision about whether to elect coverage
 - Notice must provide sufficient information necessary to understand the substance of the benefits provided, the duration of benefits, and the applicable payment obligations

Defenses Upon Merits, cont'd.

- No clear authority on whether good faith is defense
 - *Pierce v. Visteon Corp.*, 843 F. Supp. 2d. 936 (S.D. Ind. 2011)
 - A good-faith attempt to comply with a reasonable interpretation of statute suffices
 - *Valdevielso v. Cushman & Wakefield*, 2017 WL 2191053 (M.D. Fla. May 18, 2017)
 - Good-faith attempt to comply does not excuse breach-of-notice requirements
 - Good faith only applicable prior to issuance of regulations

Settlements

- Many cases have settled - some early, some later
- Settlements are often on a class-wide basis
- Preliminary approval is required before ordering notice of proposed settlement
 - Defendant support of class certification for settlement purposes does not preclude a challenge if court does not approve settlement

Settlements, cont'd.

- For settlement approval purposes, courts consider 4 factors
 - Adequacy of representation by class representatives and class counsel
 - Whether settlement negotiations were done fairly at arm's length
 - The adequacy of relief provided under the settlement
 - The equity of treatment of class members relative to one another

Actions to Mitigate Risk of COBRA Notice Litigation

- Use DOL model notice
- Review existing COBRA notice
 - Plan sponsors may have become lax in reviewing notices
 - Have it reviewed by outside ERISA counsel
- Review internal controls with respect to COBRA notification



A large graphic consisting of two dark blue speech bubbles on the left, overlapping each other. To their right, the letters "Q&A" are written in a large, dark blue, serif font.

Please submit your questions on the Session Chat box on the right.